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TORTURE, MORALITY, AND LAW

Jeff McMahan †

The morality of torture is similar to the morality of capital punishment in the following respect. There are in principle, and probably in practice, certain rare instances in which either would be morally justified. At the same time, morality itself demands that both be categorically banned in law.

Suppose that we have captured someone we know to have committed a series of daring and spectacular murders. The murderer is proud of these acts and boasts of them openly. He even had them video recorded. Suppose that because of the manner in which they were done, these murders are admired by certain people and that the evidence suggests that there are likely to be various series of “copycat” murders unless this murderer is executed. He has boasted that the state does not have the “guts” to execute him; therefore his execution will be regarded by his admirers as a defeat and a humiliation rather than a martyring.

By creating a threat of copycat murders, this man’s acts have decreased the security of innocent people in his society. To the best of our knowledge, more innocent people will be murdered, partly as a result of what he has done, unless we kill him. In short, his own wrongful acts now force us to choose between killing him and allowing a number of wholly innocent but as yet unidentifiable people to be murdered. It is therefore a matter of justice that he should be the one to die—assuming that there are no other relevant considerations that bear on the case.

Notice that I do not claim that this is because he deserves to die. The justification for the claim that he ought morally to be executed makes no appeal to retribution. It appeals instead to the same considerations that justify self-defense in paradigm cases. This man has, through his own wrongful action, created a threat of unjust harm to innocent people. Granted, his own agency would not be the immediate cause of this harm. But he would share in the responsibility for it if it were to occur, and his execution, we are supposing, could prevent it. By sharing responsibility for this threat to innocent people that can best be averted by executing him, he has made himself liable to be killed in their defense.

But even if we have here a case in which execution would be morally justified, it does not follow that the law ought to permit capital punish-

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ment. Notice that in the case I have described, the threats to be deterred by the murderer's execution are ones for which he would be partly morally responsible. If that were not the case, the use of his execution to deter others from committing similar crimes would not be just—or at least not in the same way. The structure of justification, in any case, would not be the same as in paradigm instances of killing in self-defense.

It might be suggested, then, that capital punishment should be legally permitted only when it could be shown to be justified as a form of just defense rather than retribution. But the law also has to be formulated with a view both to the facts and to the expected consequences of its promulgation and enforcement. If in fact the death penalty does not deter serious crimes more effectively than life imprisonment, as many social scientists have argued, and if the practice of capital punishment inevitably involves the accidental execution of the innocent, it is likely that capital punishment will cause greater injustice than it can prevent. This is why it should be banned.

The argument about torture has much the same structure, though the details are obviously different. The wrongfulness of torture as it is actually practiced is almost always overdetermined. There are features of torture—some of which are analyzed with insight in David Sussman's contribution to this volume¹—that may make it a uniquely awful thing to do to another person. And the reasons for which it is done are usually evil—because for decent people torture is virtually unthinkable as a means of achieving their ends. Torture is almost always, therefore, a despicable means to an immoral end.

Perhaps the worst form of torture is terrorist torture, whose instrumental function is fulfilled when the mutilated bodies of the victims are strewn in public places as a means of intimidating others. Retributive torture also lacks any justification other than in certain intuitions, which I think we should regard as the relics of an earlier stage of moral evolution—though it should give us pause to reflect that the gods of Christianity and Islam, whose holy texts were written during this earlier era, are widely believed by their worshipers to practice retributive torture extensively and everlastingly against sinners in the afterlife. Where a moral case *can* be made, along the lines of the case for capital punishment, is for what Henry Shue has called “interrogational torture”—torture not for the purpose of eliciting a confession but for the extraction of information necessary to prevent a serious wrong.²

The example that is most frequently cited to demonstrate the permissibility of interrogational torture—an example that is now criticized, as

¹ David Sussman, *Defining Torture*, 37 CASE W. RES. J. INT'L L. 225 (2006).

² See Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

it is in Henry Shue's illuminating contribution to this volume,³ with almost equal frequency—is the case of the “ticking bomb,” in which a captured terrorist has planted a nuclear bomb in a city and our only chance of getting him to reveal its location before it detonates is to torture him.

There are indeed various aspects of this example that are misleading. It invites us to consider whether it can be permissible to engage in torture in order to prevent killing, but it is at least arguable that, even if it is in general less bad to be tortured than to be killed, torture is nevertheless morally more objectionable than killing. It also suggests that, if the constraint against torture can be overridden in this case, it is because of the sheer combined weight of the consequences of not doing so. The suggestion is, in other words, that any kind of action, even torture, can be justifiable on a relatively small scale if it can prevent something as catastrophic as the killing of millions of innocent people. Finally, people who object to what they see as the glib use of the example of the “ticking bomb” argue that because this kind of case never in fact arises, it is irrelevant to urgent and important issues of law and policy.⁴

All of these objections have merit. Here is an alternative hypothetical example that avoids at least the first two.

In various countries in which torture is practiced, theologians have expressed concern about the morally corrosive effect of the practice on those whose job it is to do the actual torturing. So scientists have addressed this problem by devising a machine that obviates the need for direct human involvement in the process of torture. This machine directly stimulates the pain centers in the brain and can be set to varying levels of intensity. It does not damage the victim's body. But it can be left running indefinitely. A terrorist has acquired one of these machines. He has taken one innocent hostage whom he has strapped into the machine, which has a timer that is set to begin inflicting great pain in 24 hours unless his demands are met. We have captured the terrorist but do not know where his machine is located. Our best chance of getting him to tell us is to put him into one of our torture machines. It is reasonable to expect that we will be able to extract the information from him, though because he is a tough character, we expect to have to set our machine at a higher level than that to which his is set.

In this example, we would not practice torture to prevent killing but to prevent torture. And because we would be torturing one person to prevent the torture of only one other person, our justification cannot be that torture is necessary to prevent a catastrophe. Indeed, because our machine would be set at a higher level than his and might have to run longer (since we would

³ Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231 (2006) [hereinafter Shue, *Torture in Dreamland*].

⁴ See *id.*

keep ours going as long as his continued to run), the harm we would cause would be greater than that which we would avert.

Still, it seems to me that we would be morally justified in torturing the terrorist in this example if that were the only way we might obtain from him the location of his torture machine. Indeed, I think we would be morally *required* to torture him. The form of justification is the same as in paradigm cases of self-defense. Through his own wrongful action, the terrorist has made it the case that either he or his innocent victim will be tortured. Our torturing him is a necessary and proportionate defense of his potential victim from an unjust harm that the terrorist will otherwise wrongfully inflict, albeit through action that is now completed. Because the terrorist is morally responsible for the threat of unjust harm that our defensive action is intended to avert, we will not wrong him, nor will he have any justified complaint against us, if we torture him. For he has acted in a way that makes him morally liable to our necessary and proportionate defensive action. Note, finally, that it is within the terrorist's power to make it the case, merely by abandoning his own wrongful plan, that neither he nor anyone else is tortured.

The example is, of course, artificial and unrealistic, perhaps to an even greater extent than the case of the ticking bomb. But I believe that analogous cases can and do arise in practice, and that the structure of justification can be the same in these actual cases. There have been instances in which Israeli security forces have captured a suicide bomber with bombs strapped to his body before he could detonate them. And these forces have also captured persons in the process of making or transporting such bombs. In some of these cases, the persons captured have been tortured in order to force them to divulge information about other attacks that have been planned for the future. This information has then enabled the security forces to take preemptive action to thwart the planned attacks, thereby saving the lives of an indeterminate number of unidentifiable potential victims.⁵

In these cases, the persons captured have, through complicity in creating threats of unjust harm, made themselves liable to necessary and proportionate harm in defense of their potential victims. It is often argued, however, that torture is so heinous and vile an activity that relevant standards of necessity and proportionality simply cannot, in practice, be met. How, it is argued, can we be certain that the person we have in custody is

⁵ The sources of my factual claims in this paragraph are personal and anecdotal. The persons who have supplied my information do not have first-hand knowledge of these matters. It is possible, therefore, though not likely, that my factual claims are unfounded. But they are not unrealistic. Even if they are false, we can see that they could easily be true. And that is sufficient for my purposes here. I will therefore continue to write on the assumption that these factual claims are true.

really a terrorist? How can we be sure that there are further actions planned for the future, or, even if there are, that the person we have captured has any knowledge of them? And how can we be confident of the reliability of anything he might tell us under torture?

In the cases we are considering—which, again, I have reason to believe, but cannot prove, are actual cases—the evidence of the person's complicity in terrorism is very strong. It would normally be sufficiently compelling for a conviction in a court of law. But other questions—whether the person has knowledge that would enable us to save lives, whether torture is the best way to elicit it if he does—can seldom if ever be answered with certainty. With these questions, we are in the realm of risk. If we begin torturing the person, we are risking torturing a fellow human being to no purpose. For we may get nothing of sufficient value to justify the awful thing we will have done. If we refrain from torturing him, we risk allowing his collaborators to kill and maim innocent people. On whom should the burden of risk fall? I think there is much to be said for the claim that the terrorist's liability for complicity in the creation of threats of unjust harm makes it just that he rather than the potential victims of terrorist attacks should bear the costs. These terrible choices about the distribution of risks and harm would never have had to be made were it not for the wrongful activities of this person and his co-conspirators. Why should innocent people have to bear the costs of his wrongful action?

The idea that risks and costs should in general be imposed on those who are liable rather than on the innocent assumes that we can distinguish those who are liable from those who are not. In my examples involving people who are captured with bombs strapped to their bodies, or in the process of making such bombs, there can be little doubt of their liability. But matters are very seldom this clear. So one question that arises here is how stringent our standards of evidence should be in determining liability. It is striking, for example, that our requirements for determining liability to the death penalty are almost incomparably more exacting than our standards for determining liability to killing in war. We insist on a variety of safeguards to ensure that we do not execute an innocent person by mistake. But we take few precautions to ensure that in war we do not kill the innocent by mistake. I am not here referring to acts of war that kill the innocent as a side effect of attacking a military target. I am referring instead to intentional attacks against people who are believed to be legitimate targets but in fact may not be.

Some people argue that in defending our society against terrorism we should insist on standards of evidence of liability that are as stringent as the standards we employ in implementing the death penalty. If these people are right, cases in which torture might be morally justified by the same types of consideration that can justify killing in self-defense will be very rare. Other people argue, however, that even if social defense against terror-

ism is different from war in many ways, it is nevertheless like war in permitting a certain laxity in the standard of proof of liability. If this is right, it could be just in a broader range of cases to inflict harms on suspected terrorists, even when the evidence of their liability fails to meet the standards on which we insist in domestic law, rather than to allow people we know to be innocent to remain at greater risk.

Another possibility is that the positions I have described in the previous paragraph constitute a false dichotomy. For it can be argued that the reason we can accept a less stringent standard of proof of liability to attack in war is that in war there is virtually no scope for mistake. For in war it is sufficient for liability to attack merely to be a member of the enemy military. If a person wears a uniform, he is liable and may be killed even in the absence of evidence that killing him will be of military value.

Yet there are at least two reasons why the problem cannot be dissolved in this simple way. One is that even if we take the distinction between combatants and noncombatants to mark the boundary between those who are liable to attack in war and those who are not, the distinction between combatant and noncombatant is itself difficult to draw and in practice it is often quite difficult to determine who has combatant status and who does not. As a result, mistakes do occur: people who are in fact combatants are spared while those who are in fact noncombatants are attacked in the belief that they are combatants.

The other problem is that combatant status may not be sufficient for liability, nor noncombatant status sufficient for immunity. This is in fact my view. I think, for example, that those who fight in a just cause by permissible means cannot be liable to attack.

I will not, however, pursue this dialectic further. For I believe that there is a deeper issue here that decisively decides the practical question about torture and thus makes it unnecessary, as a matter of practice, to determine what the standards of evidence of liability should be in dealing with suspected terrorists.

It is not possible, at least at this stage in the evolution of international institutions, to formulate international law for the regulation of conflicts in a way that distinguishes, at least below the level of the political leadership, between those who have right or justice on their side and those who do not. The law of war, for example, cannot distinguish between soldiers who fight for a just cause and those whose cause is unjust, assigning one set of rights and protections to the former and another set to the latter. We have no choice, it seems, but to formulate neutral laws that are equally satisfiable by all belligerents. Because wars are inevitably going to be fought, because they cannot be fought without killing, and because they must nevertheless be regulated by law, it follows that the law of war must permit killing by both sides. This means that the law of war has to permit the killing of the just by the unjust.

Just as unjust wars of aggression will inevitably occur and will in many instances have to be countered by a just war of defense, so terrorist acts against our own society and against other societies are also inevitable. And just as killing in war cannot be legally permitted to one side but not the other, so too, in the large area encompassing the overlapping spheres of war, counterterrorism, and international police work, the use of torture cannot be legally permitted to the just but not to the unjust. Killing cannot be banned in war; therefore it must be permitted to both sides. This is bad enough. It would be intolerable if torture were permitted, even in tightly circumscribed conditions, to the just and the unjust alike. I have not sought to identify the features of torture that make it uniquely morally repugnant; but whatever they are, they rule out the possibility that the law could ever permit wrongdoers to practice torture as a means of achieving unjust aims.

Fortunately, torture is unlike killing in war in that it can be legally banned. Since its use cannot in practice be legally restricted to the just, and since it must not be permitted to all, the only option is to prohibit it to all, absolutely and categorically.⁶

I argued earlier, however, that torture can on rare occasions be morally justified. What must an individual do in a situation in which torture seems morally required but is legally prohibited? What, for example, should people do if they have captured a person carrying irrefutable evidence of involvement in terrorist plots who refuses to reveal information that is necessary in order to thwart those plots? If, after taking into account the effect that engaging in torture might have on general respect for the law that forbids it, a person still has good reason to believe that morality requires that he engage in torture, because the person to be tortured is clearly liable and the torture would be a necessary and proportionate means of defending the innocent, then I think that person ought morally to engage in torture.

But this person, and the organization that authorizes his counterterrorist work, must remain accountable to the law. This person and his associates may plead for leniency, but they must submit themselves for punishment. They cannot claim a legal justification, in the way that someone who is charged with homicide may claim a justification of self-defense. For we do not want the law to contain provisions for the recognition of justified torture. Nor would it make sense for them to claim an excuse. Because they acted on the basis of a moral justification, none of the recognized excuses would seem to apply.

⁶ Although my argument here is quite different from his, I would like to go on record as registering emphatic agreement with the argument that Henry Shue movingly and compellingly develops in *Torture in Dreamland* against the practical possibility of an institution that would legalize torture but only in rare and exceptional cases. See Shue, *Torture in Dreamland*, *supra* note 3.

In paradigm instances of civil disobedience, a person breaks a law openly in order to challenge it, but nevertheless submits herself for punishment in order to demonstrate respect for the law in general, and for the rule of law. If the law that is challenged is in fact a bad law, this person sacrifices herself for the sake of morality. She willingly accepts penalties as a means trying to bring about a morally better state of affairs.

The same must be true of someone who practices torture when it is morally required but legally prohibited (except, of course, that his reason for violating the law would not be to challenge it). We rightly regard torturers, in general, as the most morally degraded of human beings; but in these rare cases of morally justified torture, the torturer would be, paradoxically, a martyr to a higher morality. He would, in fact, be doubly martyred, for there would be two dimensions to his sacrifice. He would have to accept punishment for having done what, in the circumstances, was morally necessary; but he would also have sacrificed something of importance in his own moral nature by having to override powerful inhibitions against a form of action that no decent person could engage in without the deepest moral revulsion.